No. 1037

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IN THE

Supreme Court of the United States

October Term, 1966

TAI MUI,

Petitioner,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals was entered on December 9, 1966. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Involved

1. Are crewmen eligible to adjust their status pursuant to Section 203(a)(7) of the Immigration and Nationality Act of 1952 as amended?

2. Did the United States District Court have jurisdiction to review this proceeding?

Statute Involved

Immigration and Nationality Act, as amended Section 106, 8 U.S.C. (1964 Ed.) 1105a.

> (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended * * *, shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act * * * except that——
>
> (1) A petition for review may be filed not later than six months from the date of the final order of deportation * * *;
>
> * * *
>
> (9) Any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

Section 203(a), 8 U.S.C. (1964 ed. Supp. I) 1153(a).

> "(7) Conditional entries shall next be made available by the Attorney General, pursuant to such

regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a) (ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United Statees for a period of at least two years prior to application for adjustment of status."

Section 245, 8 U.S.C. (1964 ed.) §1255:

"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the At-

torney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved." • • •

Regulations Involved

Title 8 Code of Federal Regulations [Rev. January 1, 1966]:

§245.1 *Eligibility*

(a) General. An alien who on arrival in the United States was serving in any capacity on board a vessel or aircraft, or was destined to join a vessel or aircraft in the United States to serve in any capacity thereon, or was not admitted or paroled following inspection by an immigration officer is not eligible for the benefits of section 245 of the Act."

• • •

(d) *Immediate relatives under section 201(b) and preference aliens under section 203(a)(1) through 203(a)(7).*

"• • • An alien who claims preference status under the proviso to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act and as provided in §245.5, unless the District Director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act." [31 F.R. 535, January 30, 1966].

§245.4 *Adjustment of status under the proviso to section 203(a)(7) of the Act.*

"The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) of the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the Proviso to Section 203(a)(7). Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination."* [31 F.R. 536, January 15, 1966].

Statement

The petitioner is a native and citizen of China who entered the United States a crewman on July 13, 1961. He has continuously resided in the United States since that date. After his entry into the United States in 1961 he had a deportation hearing in January, 1964. At that hearing he made an application for voluntary departure, which was the only relief then avaiable to him under the immigration law. Although he was given until November

* This subsection was amended to add the last two sentences. 31 F.R. 536, January 15, 1966.

1, 1965 to voluntarily depart from the United States he did not avail himself of this privilege.

On October 3, 1965 there was a broad base amendment to the immigration laws for the purpose of liberalizing immigration to the United States. This was the first substantial change in the immigration statutes since 1952.

The 1965 statute had "as its primary objective the abolishment of the national origins quota system for the allocation of immigrant visas and the substitution of a new system of allocation based on a system of preferences which extends priorities in the issuance of immigrant visas to close relatives of United States citizens and aliens lawfully admitted for permanent residence, to aliens who are members of the professions, arts, or sciences, and to skilled or unskilled alien laborers who are needed in the United States, and to certain refugees." S. Rep. No. 748, 89th Cong., 1st Session (1965).

In February of 1966 the Immigration Service notified the petitioner that he must surrender for deportation to Hong Kong. The petitioner, having fled the Mainland of China in 1956 because of Communist control of that country, made an application to the Immigration Service to have his status adjusted to that of a permanent resident, pursuant to Section 203(a)(7) of the Immigration and Nationality Act of 1952, as amended, and for a stay of his deportation pending the determination of said application. The petitioner's application for a stay of deportation was denied on the ground that since he entered the United States as a crewman, he was not eligible to

adjust his status in the United States pursuant to Section 245, 8 U.S.C. 1255.

The petitioner then commenced an action in the United States District Court alleging that he was entitled to apply for the adjustment of his status pursuant to Section 203(a)(7) of the Immigration and Nationality Act of 1952 as amended, and that the Regulations No. 8 C.F.R. 245.4 which make him ineligible for such relief, are illegal and void. The respondent then made a motion for summary judgment on the ground that the District Court lacked jurisdiction over the subject matter and, in the alternative, for summary judgment dismissing the complaint as a matter of law. The District Court (Levet, D. J.) held that the United States District Court had subject matter jurisdiction but granted the respondent's motion for summary judgment on the merits of the case.

An appeal was filed in the United States Court of Appeals for the Second Circuit from this determination. The Court, recognizing that this case was one of "first impression" of the interpretations of the provisions of the Immigration and Nationality Act amendments of 1965, wrote an extensive opinion affirming the judgment of the District Court.

The Court made note of the fact that the language in the statute was not specific and necessitated an interpretation by the Court:

> "While the proviso would have been clearer if language such as 'eligible for adjustment of status under the provisions of this Act,' had been inserted after 'aliens,' * * * *" (See Page 32 of Appendix.)

The Court also stated that a statement in the Senate Report dealing with this section was less than compelling (See Pages 33-34 of Appendix); and also stated that Section 203(a)(7) was susceptible of either of two constructions (See, also, Page 34 of Appendix).

The Court of Appeals also went into the jurisdictional question raised by the Government, and there, too, the Court indicated that there was a serious problem in which there has been a conflict in the different Circuits throughout the Country.

Page 29 of the Appendix states Seventh Circuit has taken an opposite view in the case of *Roumeliotis* v. *I. N. S.*, 304 F. 2d 453, cert. denied, 371 U.S. 921 (1962). They also made note in a footnote to their decision with reference to the confusion that Section 106 of the Immigration and Nationality Act has brought to judges and courts alike. (See footnote "3", Page 32 of Appendix.)

Reasons for Granting the Writ

The decision below raises two important questions affecting the rights of certain refugees in the United States and with reference to the scope of the jurisdiction that the Court of Appeals has under Section 106 of the Immigration and Nationality Act.

I

The first is whether the Attorney General, by regulation, can restrict the provisions of the Immigration Act of 1965, and more specifically, whether the Attorney General can

impose additional requirements on aliens, which requirements are not included in the statute.

The Immigration Bill of October 3, 1965 was the first major revision of the Immigration Law since 1952. It was the announced intention of the Congress and the President of the United States to liberalize and remove the discriminatory aspects of the previous immigration laws. It appears that although the Congress intended to be less restrictive in permitting immigration to the United States, that the enforcement officers of the Immigration Service are placing complex barriers on aliens wishing to obtain the benefits prescribed by Congress. The petition is the first assault made in this Court upon the regulations promulgated by the Attorney General to restrict the provisions of the Immigration Act of 1965.

This action deals specifically with Section 203(a)(7) of the Immigration Act. This section is the first permanent refugee provision written into the Immigration Laws. In the past, Congress would make a provision to assist refugees in legalizing their status in the United States by special immigration bills and by legislation designed to fulfill a particular purpose. This was done when the Hungarian refugees came to the United States and, previous to that, after World War II when there were many refugees in many countries, including the United States. Realizing that piecemeal legislation is not advantageous to the proper functioning of the immigration laws, Section 203(a)(7) was included in the general revision of 1965. It was hoped that this provision would satisfy the requirements of the refugee problem existing today and in the future. To

be specific, it authorizes the conditional entry into the United States of aliens who, because of persecution or fear of persecution, because of race, religion, or political opinion, have fled from any Communist or Communist-dominated country, and who are unwilling to return to such country because of fear of persecution, on account of race, religion or political opinion. It also states that "immigrant visas in a number not exceeding one-half the number specified in this paragraph, may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status." The petitioner appears to satisfy the first requirement of Section 203(a)(7), in that, because of persecution, he fled from a Communist, or Communist-dominated country, and is unwilling to return to that country. The petitioner is a native and citizen of China. He escaped from the Mainland of China in 1956. On the face of it, the petitioner appears to be eligible to have a visa number made available to him for conditional entry into the United States. However, he has resided in the United States for a period of more than two years. He, therefore, would appear to be eligible to adjust his status without having to leave the United States. However, since the regulations promulgated by the Attorney General, Section 8, C.F.R. 245.4 state that the provisions of Section 245 of the Immigration Act shall govern the adjustment of status provided for in the proviso to Section 203(a)(7) of the Act, the enforcement officers of the

Immigration Service have ruled him ineligible to make an application for adjustment of status pursuant to Section 203(a)(7).

It is the petitioner's contention that the regulations promulgated by the Attorney General are illegal and in violation of law since they are more restrictive than the statute passed by Congress. Since they incorporate Section 245 into Section 203(a)(7), additional grounds for eligibility for relief are added to the statute. Section 245 is not available for use by aliens who enter the United States as crewmen, aliens who enter without inspection, and natives of the Western Hemisphere.

Section 203(a)(7) does not specify the manner of the entry of the alien who is applying for adjustment of status. In fact, it is quite logical to presume that a person who is a refugee would have entered this country other than by the normal means of going to a Consul and obtaining a visa. If the Government's position is correct, aliens who come to the United States without being inspected or, who come to these shores without visas, would also be precluded from adjusting their status pursuant to this section, the reason being that an alien who entered the United States without inspection, is not eligible to adjust his status pursuant to Section 245. On a reading of Section 203(a)(7) the law is quite clear. There are two requirements: (1) the requirement that an alien be a refugee, and (2) that he be a resident of the United States for a period of at least two years. There are no other requirements in the law. For the Attorney General to add additional requirements, such as the manner of an

alien's entry into the United States which, by its very nature, would eliminate numerous refugees from the benefits of this section, is an improper interpretation of a statute enacted for humanitarian purposes. It appears that the Attorney General wishes to assist only those aliens who had enough rapport with the authorities in their country from which they supposedly fled, to be able to get a passport or other documents and follow the regular procedures in gaining temporary admission to the United States.

It is difficult for the writer to believe that a person who has *fled* from a Communist, or Communist-dominated country, would use or could use, the normal route, that is, getting a passport from the authorities in the Communist country for the purpose of visiting the United States; going to the American Consul in the Communist country; and then obtaining a visitor's visa from the American authorities in that country to visit the United States. It appears to the writer that a true refugee under present world conditions would not find it so easy to get the proper documents to flee from his homeland. Many refugees struggle and fight to escape from their homelands in many different ways. Usually, the escapee cannot follow the normal route used by those persons to whom the Attorney General wants to limit eligibility. The writer finds it difficult to believe that the Congress wished to exclude refugee aliens who have had more trouble getting to the United States than persons who were given permission by their Communist-dominated country to travel to the United States. However, the Attorney Gen-

eral's construction of Section 203(a)(7) leads to this absurd result.

The respondent is treating the visas made available pursuant to Section 203(a)(7) in the same manner as he is treating the other seven subdivisions of Section 203. It is interesting to note that Sections 1, 2, 3, 4, 5, 6, and 8 mention only the preference in which visas shall be made available to intending immigrants. Nowhere in those subdivisions is the method of obtaining the visa mentioned, except that Section 203(a)(7) specifies the manner in which a refugee can obtain conditional entry into the United States and the way a refugee may adjust his status in the United States. Thus we can see that subdivision "7", the one in issue at the bar, is inherently different from the other seven subdivisions of Section 203 because it provides the method for obtaining entry into the United States in addition to providing the availability of a quota number. An alien for whom a quota number would be available under any of the other seven subdivisions of Section 203(a)(7) would, of course, be eligible to adjust his status pursuant to Section 245 of the Immigration Law and be bound by the requirements of Section 245. If subdivision "7" was to have been governed by Section 245, the words: "adjustment of status" would not have had to be included in this section, or Congress could have added some additional words indicating that Section 245 would apply.

The position of the Government is that the Congress intended to limit the rights of seamen. However, if the Government's interpretation of the statute is accepted by

this Court, not only would seamen be injured, but other aliens would be injured as well. The Government's position that Congress has become increasingly more stringent in its attitude toward crewmen is also contradicted by the Act of October 3, 1965 in the following manner: Prior to the new immigration law, no crewmen were eligible to adjust their status pursuant to Section 244 of the Immigration and Nationality Act. The new Bill amended Section 244 and aliens who entered as crewmen prior to July 1, 1964 are now eligible to apply for the suspension of their deportation pursuant to Section 244. Therefore, Congressional intention, which is evidenced by the affirmative acts of Congress, would indicate a more liberal attitude toward crewmen. It is significant to note that nothing was mentioned in the House Report nor in the Conference Report with reference to Section 245 being the method used to adjust the status of aliens who qualify pursuant to Section 203(a)(7).

The basic rule of law is that enabling legislation in immigration should be construed liberally while deportation statutes should be construed strictly. The Government's position will preclude many aliens from gaining the benefits of a humanitarian section of the law and will assist no one. The interpretation should be a liberal one to aid refugee aliens in the United States.

In 1960, the Congress amended the Immigration and Nationality Act to exclude crewmen from the operation of Section 245. The rationale for that amendment, in part, was that crewmen, because of their calling, mobility, and easy means of entry into the United States, were able to create family ties, or employment opportunities for

preference petitioners, which their non-mobile counterparts in their home countries could not do; that they, therefore, because of their calling, were able to gain an unjustified advantage in quota and immigration requirements over their fellow nationals; that they often became crewmen solely for the purpose of obtaining easy admission to the United States for the very purposes described above, and abandoned their crewmen calling as soon as their basic purpose was accomplished; and that, for the above reasons, among others, it was not in the interest of our government to aid and abet them by permitting them to avail themselves of the simplified immigration procedure contained in Section 245.

None of that rationale has even the remotest application to the instant situation. The petitioner did not become eligible for quota availability under the provisions of Section 203(a)(7) because he was a crewman. His eligibility was, and contined to be, based upon the sad fact that his country was overrun by Communists, and that he is a refugee from his country because of his opposition to Communism. Nothing he has done in the United States has in any way changed or enhanced his status as a refugee. It has simply, fortuitously, placed him within the purview of the proviso to Section 203(a)(7), a fact which he could in no way have known at the time of his entry, which was almost five years prior to the enactment of the said law.

An examination of the legislative history does not indicate that the Congress intended to discriminate against *bona fide* refugees simply because of their calling as crew-

men. Such a discrimination cannot and should not be read into the law simply because the Attorney General has seen fit to implement it by a procedure containing a restriction, in no way related to general immigration eligibility, against crewmen which was enacted in different circumstances and for entirely different purposes.

The Government's position in this matter and its position in not permitting applications for classification pursuant to Section 203(a)(7) in the Far East, precludes the petitioner from ever obtaining the benefits of this section of the law. If the Government's position is correct here, the petitioner cannot adjust his status in the United States. If that is so, he will be deported to Hong Kong. If he wishes to make an application to return to the United States as a refugee, he will again be foiled because the Immigration Service has not set up any offices for the processing of these types of cases in the Far East even though there is an American Consul in Hong Kong and there are immigration and naturalization service officers in Hong Kong.

Thus it can be seen that contrary to the statement made by the Court below (See Page 34 of Appendix), an absurd and unfair result does occur.

There are a great many aliens who have been affected by the determination of the Immigration Service in this matter. At the present time there are well over two hundred cases pending in the Federal Courts of New York. In addition, there are well over fifty cases pending in the United States Court of Appeals for the Third Circuit in

Philadelphia, Pennsylvania. There has been no decision in the cases pending in the Court of Appeals in Philadelphia where the additional problem of jurisdiction has been confused by opposite views taken by various District Court Judges in Newark, New Jersey.

II

The second question posed by the decision below is one of jurisdiction. Although the courts below sustained petitioner's contention that this case was properly instituted in the United States District Court, there is a question of law still undertermined because different determinations have been made by other courts.

This issue is one of recurring importance in the litigation of immigration matters, as can be seen from the following:

In 1961, Section 106(a), 8 U.S.C., Section 1105 was enacted by the Congress granting the Court of Appeals original jurisdiction over certain immigration matters. Since that time, the exact scope of the judicial review bill has created a muddy situation. It has been a difficult section for judges and lawyers alike. (See opinion below.)

The respondent herein has argued both in the District Court and in the Court of Appeals that the Court of Appeals has exclusive jurisdiction over all immigration matters and, more particularly, in the case at bar. Although in the instant matter the courts below have rejected the respondent's contention, their contention has been upheld

by a District Court Judge in the United States District Court in Newark.

In the case of *Wu Chun Hin* v. *Rinaldi*, Civ. No. 402-66, decided June 13, 1966, Judge Anthony Augelli ruled that the Court of Appeals has exclusive jurisdiction over a matter involving the same question of law and administrative procedure as followed herein.

Thereafter, on June 27, 1966, Judge Reynier J. Wortendyke, Jr., in the case of *Lam Ying Kwan, et al.* v. *Rinaldi*, Civ. No. 483-66, ruled that where the plaintiff asked for a stay of deportation only, and not for discretionary relief there, too, the Court of Appeals has exclusive jurisdiction over these matters.

A different conclusion was reached by Judge Coolahan of the same Court, in the case of *Cheng Ho Mui* v. *Rinaldi*, Civ. No. 368-66. In an extensive opinion on the same law and similar facts as in the *Lam Ying Kwan* case, the Court found that the Court of Appeals did not have exclusive jurisdiction over all immigration matters, but only those in relation to Section 242(b) proceedings involving final orders of deportation.

All of the above three cases are presently pending on appeal in the United States Court of Appeals for the Third Circuit.

In addition to these cases, the Seventh Circuit has taken a different position than the Second Circuit. See *Roumeliotis* v. *I.N.S.*, 304 F. 2d 453, cert. denied, 371 U.S. 921 (1962); *Skiftos* v. *I.N.S.*, 332 F. 2d 203 (1964); *Malone* v. *I.N.S.*, 355 F. 2d 533 (1966).

The leading case on the subject is *Foti* v. *I.N.S.*, 375 U.S. 217 (1963). In that case, the Supreme Court ruled that the Court of Appeals has exclusive jurisdiction over all final orders of deportations and determinations made during a 242 (b) hearing.

However, as can be seen from the cases cited above, many questions are still in doubt. These questions must be resolved so that both lawyers, judges and administrative officials will have a clearer picture of the jurisdictional limits of the Court of Appeals and the District Courts.

CONCLUSION

Wherefore, in consideration of the magnitude of the questions presented, and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

Before:

FRIENDLY, SMITH and FEINBERG,
Circuit Judges.

FRIENDLY, *Circuit Judge*:

These cases present questions, of first impression for us, of the interpretation of the provisions of the Immigration and Nationality Act Amendments of 1965, 79 Stat. 911, 912-13, according certain refugees preferences for lawful admission.

I.

The 1965 statute had "as its primary objective the abolishment of the national origins quota system for the allocation of immigrant visas and the substitution of a new system of allocation based on a system of preferences which extends priorities in the issuance of immigrant visas to close relatives of U. S. citizens and aliens lawfully admitted for permanent residence, to aliens who are members of the professions, arts, or sciences, and to skilled or unskilled alien laborers who are needed in the United States, and to certain refugees". S. Rep. No. 748, 89th Cong,. 1st Sess. (1965), in 1965 U. S. Code Cong. & Adm. News 3329-30. Section 201(a) as amended now provides that, subject to exceptions not here material, "the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence" shall not exceed 170,000 in any fiscal year. Section 203 lists seven

categories of aliens subject to these numerical limitations who are entitled to preferences. The first six of these, entitled in the aggregate to 94% of the 170,000 total, are to receive visas from United States consular representatives abroad. Section 203(a)(7) dealing with refugees, with which we are here concerned, establishes a different procedure for the remaining 6%, or 10,200 per year. It prescribes that "Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe . . . to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country", that they come within the statutory definition of refugee, "Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status".

The further handling of an alien who conditionally entered under §203(a)(7) was prescribed in §203(g) and (h). After two years presence, if his conditional entry has not been terminated by the Attorney General and he has not established permanent residence, he must return to the INS for inspection and examination and is dealt with as any other qualified immigrant except that he is excused from the possession of documents required by §212(a)(20). The 1965 Act made only unimportant amendments to §245,

the provision of the Immigration and Nationality Act dealing generally with the adjustment of status of a nonimmigrant to that of a person admitted for permanent residence. Subsection (a) provides:

> "(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

Subsection (b) directs that upon the approval of an application for adjustment under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence and the Secretary of State shall reduce by one the number of preference or nonpreferenc visas authorized by §203(a) "within the class to which the alien is chargeable, for the fiscal year then current".

The Attorney General issued revised regulations to implement §203(a)(7). Those pertinent to conditional entry are 8 C. F. R. §235.9(a) and (c), 31 F. R. 5118 (1966):

> "§235.9 Conditional entries.
>
> "(a) *Countries in which applications may be filed.* Pursuant to agreements entered into with the gov-

ernments of the countries concerned, officers of the Service are authorized to accept applications and to examine the qualifications of applicants for conditional entry under section 203(a)(7) of the Act, in Austria, Belgium, France, Germany, Greece, Italy, and Lebanon. Applications for conditional entry may be filed only by aliens who are physically present within one of the designated countries.

"(b) * * *

"(c) *Application.* A separate application for conditional entry under section 203(a)(7) of the Act shall be executed and submitted by each applicant on Form 1-590 to the officer in charge of the nearest Service office outside the United States. Each applicant under this paragraph shall appear in person before an immigration officer and excepting a child under 14 years of age shall, prior to the adjudication of his application, be interrogated under oath concerning his eligibility for conditional entry into the United States. * * * The approval of an application by an officer in charge outside the United States authorizes the district director at a port of entry to effect the conditional entry of the applicant upon arrival at such port within 4 months after the date of the approval. * * *"

Those relevant to the adjustment of status proviso are a portion of 8 C. F. R. §245.1(d), 31 F. R. 535 (1966):

"(d) *Immediate relatives under section 201(b) and preference aliens under section 203(a)(1) through 203(a)(7).*

"* * * An alien who claims preference status under the proviso to section 203(a)(7) of the Act

> is not eligible for the benefits of section 245 of the Act and as provided in §245.4, unless the District Director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act."

and §245.4, 31 F. R. 536 (1966:

> "§245.4 *Adjustment of status under the proviso to section 203(a)(7) of the Act.*
>
> "The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) of the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination." [31 F. R. 536, January 15, 1966].

II.

Tai Mui had last entered the United States as a crewman on July 31, 1961. He was ordered to be deported to Hong Kong and was scheduled to exercise his privilege of

voluntary departure on or before November 1, 1965. After failing to depart and being directed to surrender for deportation, he applied to the New York District Director for a stay of deportation under 8 C. F. R. §243.4 in order to prosecute an application for adjustment of status under the amended act. The Director denied the application on the basis that §245 of the Act and 8 C. F. R. §245.1 rendered a crewman ineligible to avail himself of the proviso to §203(a)(7) as a preliminary step to adjusting his status. Tai Mui thereupon sued the District Director in the District Court for the Southern District of New York for a judgment declaring that his being a crewman did not deprive him of the benefits of the proviso to §203(a)(7), that the regulations making him ineligible for such relief on that basis are void, and that a stay of deportation should be granted pending final determination of an application for adjustment of status pursuant to such declaration. Holding that the district court was not deprived of jurisdiction by §106(a) of the Immigration and Nationality Act vesting the courts of appeals with exclusive jurisdiction for review "of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act," Judge Levet sustained the District Director on the merits and granted summary judgment dismissing the complaint, from which Tai Mui appeals.

Chan Hing and Lai Cho, also crewmen, were ordered to be deported to Hong Kong and were given until October 1965 to effect voluntary departure. Having been com-

manded to surrender for deportation, they applied to the New York District Director for a stay of deportation until their applications for refugee classification under §203(a)(7) were adjudicated. Admittedly they did not qualify under the two-year requirement of the proviso, since Lai Cho's last entry was on December 11, 1964, and Chan Hings' on April 11, 1965. They contended that, nevertheless, they would be entitled to conditional entry if they could satisfy an INS officer in the United States, concededly a "non-Communist or non-Communist-dominated country," of their refugee status, and that they could then proceed to some other country from which they would enter the United States; or, if his contention should not be accepted, that the Attorney General abused his discretion by failing to place officers of the INS in some country in the Far East where Chinese would stand a better chance of gaining temporary admission for the purpose of making an application. When the District Director denied their applications, they too sued in the District Court for the Southern District of New York for a declaratory judgment of the invalidity of the regulations and their entitlement to a stay. In their case also Judge Levet held the district court had jurisdiction but dismissed the complaint on the merits, and they appeal.

Woo Cheng Hwa entered the United States as a crewman in June 1963 and was ordered in 1965 to be deported to the Republic of China on Taiwan, being given until April 1, 1966 to depart voluntarily. Having been directed

to surrender for deportation, he moved to reopen the deportation proceedings to adjust his status to that of a permanent resident, contending that he was entitled to this relief by reason of the proviso to §203(a)(7) despite his lack of the refugee classification approved by the District Director required by 8 C. F. R. §245.1(d). Denial by a Special Inquiry Officer and dismissal of his appeal by the Board of Immigration Appeals followed in short order. He here seeks review under §106(a).

III.

We must first consider whether the District Court had power to entertain the declaratory judgment actions brought by Tai Mui and by Chan Hing and Lai Cho. The Government concedes it had jurisdiction over the latter but denies it had this in the former, although believing the initial handling of both types of cases by the district court to be preferable from an administrative standpoint.

We readily agree that the District court had jurisdiction over the action brought against the District Director by Chan Hing and Lai Cho. The statute makes the jurisdiction of the courts of appeals exclusive only as regards "the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242 (b) of this Act." The action did not challenge the deportation orders, and the District Director's refusals of stays under 8 C. F. R. §243.4, which are all it did challenge, were

not made pursuant to administrative proceedings under §242(b). Jurisdiction of the District court is in no way foreclosed by the construction given the statute in *Foti* v. *INS,* 375 U. S. 217 (1963). The Supreme Court there decided that the statutory language covered "a denial of discretionary relief, made during the same proceedings in which deportability is determined, which effectively terminates the proceeding," 375 U. S. at 224, a view reinforced by the consideration that "the administrative discretion to grant a suspension of deportation has historically been consistently exercised as an integral part of the proceedings which have led to the issuance of a final deportation order, and discretionary relief, if sought, must be requested prior to or during the deportation hearing," 375 U. S. at 223, all under §242(b) to which the statute vesting exclusive jurisdiction in the courts of appeals expressly refers. Neither is district court jurisdiction precluded by the later *per curiam* in *Giova* v. *Rosenberg,* 379 U. S. 18 (1964), settling in the affirmative what the Court had characterized in *Foti* as the "somewhat different" question "whether §106(a) extends the exclusive jurisdiction of the Courts of Appeals to include review of orders refusing to reopen deportation proceedings." 375 U. S. at 232. Examination of the record in that case shows that the Board of Immigration Appeals had entertained Giova's motion to reopen the deportation proceeding to grant him a waiver of a ground of excludability provided in §212(g) of the Immigration and Nationality Act or in the alternative for suspension of deportation under §244; its denial of the motion was thus a part of the deportation proceeding itself. *Foti*

and *Giova* do not place within the scope of §106 determinations, such as the one involved here, which do not attack the deportation order itself but instead seek relief not inconsistent with it. Chan Hing and Lai Cho have made no motions to reopen their deportation proceedings and there was no basis on which they could have done so. Rather, their objective was to obtain "conditional entry" which would allow them to depart from the United States, hopefully to some nearby country, with the assurance that they could immediately make lawful entry or, failing that, to be allowed to remain here until the INS opened an office to handle conditional entry applications at some country in the Orient to which they would voluntarily depart.

The Supreme Court' decisions do not demand or even justify our recasting §106(a) so as to give the courts of appeals exclusive jurisdiction over all orders made by immigration officers which might affect the deportation of aliens, subject only to the recognized exception for habeas corpus; if Congress had wanted to go that far, presumably it would have known how to say so. We recognize that the Seventh Circuit has taken or at least come close to taking this position, see *Roumeliotis* v. *INS*, 304 F. 2d 453, cert. denied, 371 U. S. 921 (1962) [denial of first preference visa and stay of deportation]; *Skiftos* v. *INS*, 332 F. 2d 203 (1964) [denial of first preference visa]; *Melone* v. *INS*, 355 F. 2d 533 (1966) [denial of stay of deportation in order to visit brother confined in mental hospital], and we appreciate that such a view has the merit of avoiding sterile jurisdictional controversy. But we do not feel war-

ranted in going so far beyond the words that Congress used; indeed, we are already committed against any such broad position. *Lam Tat Sin* v. *Esperdy*, 227 F. Supp. 482, 484 & n. 2 (S. D. N. Y.), aff'd without discussion of the point, 334 F. 2d 999 (2 Cir.), cert. denied, 379 U. S. 901 (1964). See also *Samala* v. *INS*, 336 F. 2d 7, 12-13 (5 Cir. 1964); *Mendez* v. *Major*, 340 F. 2d 128 (8 Cir. 1965). On the precise point here at issue we follow Judge Coolahan's convincing opinion in *Cheng Ho Mui and Pun Yi Pan* v. *Rinaldi*, Civ. No. 368-66, D. N. J. (1966).

Although these same considerations would seem on their face to settle the jurisdictional issue in Tai Mui's action since he also has never moved to reopen the deportation order or conducted any proceedings under §242(b), the Government says his case is different because he ought to have followed that route, as Woo Cheng Hwa did.[1] It contends he should have moved to reopen the deportation proceeding for an adjustment of his status despite the Attorney General's regulations, binding upon the Special Inquiry Office and the Board of Immigration Appeals,[2] which declare ineligible for adjustment of status an alien

[1] 8 C. F. R. §245.2 provides that an application by an alien for adjustment of status "after he has been served with an order to show cause or warrant of arrest shall be made and considered only in proceedings under Part 242 of this chapter".

[2] Since the Board exists only by virtue of the Attorney General's regulations, 8 C. F. R. Part 3, it naturally regards itself as bound by them in all respects and will not consider challenges to their validity. *Matter of Tzimas*, 10 I. & N. Dec. 101 (1962); see Gordon and Rosenfield, Immigration Law and Procedure §1.10 at 1-50, 1-59 (1966).

lacking a refugee classification approved by the District Director whose determination is expressly immunized from review, and the consequent futility of such a motion at the administrative level.

While the jurisdictional question in Tai Mui's case is much closer than in Chan Hing's and Lai Cho's, the Govment's contention would take us too far from the statutory language and purpose, and would make the statute something of a trap. Faced with a regulation which barred an application for reopening the deportation order to adjust status in the absence of a classification approved by the District Director and with a refusal by the latter not subject to administrative appeal, Tai Mui's lawyer did what most attorneys would have regarded as the natural and sensible thing to do; he attempted to remove the roadblock by obtaining a court order that the District Director must consider Tai Mui's application on its merits and without regard to his being a crewman, just as if Tai Mui had sought to regularize status before becoming subject to an order of deportation. Reading 8 C. F. R. §245.2 in the context of the other provisions applicable in this situation, especially 8 C. F. R. §§245.1(d), 245.4, we hold that Tai Mui was not required to go through the motions of requesting to be heard by a Special Inquiry Officer and then appealing to the Board of Immigration Appeals, but was entitled to challenge the District Director's administratively unreviewable refusal in the district court. A different case would be presented if the Attorney General were to place determinations pursuant to the proviso of

§203(a)(7) under the aegis of Special Inquiry Officers with appeals to the Board of Immigration Appeals, see *Foti* v. *INS*, *supra*, 375 U. S. at 230 n. 16.[3]

IV.

The substantive question raised by Tai Mui's appeal and Woo Cheng Hwa's petition fo rreview is whether the proviso to §203(a)(7) permitting up to 5100 visas a year to "be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status" incorporates the limitation of §245 making adjustment of status thereunder unavailable to an alien crewman, or—perhaps more accurately—whether the Attorney General by regulation may so provide. We answer in the affirmative.

While the proviso would have been clearer if language such as "eligible for adjustment of status under the provisions of this Act," had been inserted after "aliens," we are satisfied Congress intended to accord the preference only to aliens who were entitled to have their status ad-

[3] These cases point up the desirability of Congress' clarifying this needlessly murky piece of legislation and rescuing lawyers and judges from the fruitless jurisdictional disputes that will continue to plague them until it does, as the writer predicted some years ago. The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't, 63 Col. L. Rev. 787, 795-96 (1963). Such legislation could well be preceded by an inquiry whether the 1961 Act is producing the expedition that was contemplated.

justed under existing law rather than to direct the Attorney General to create by regulation a new category for the adjustment of the status of other aliens. In this way Congress excluded from the preference, so far as concerns those who could not qualify under some section other than §245, aliens who had entered illegally and alien crewmen, a group it had characterized as guilty of "frequent abuses of the immigration laws." H. R. Rep. No. 2088, 86th Cong. 2d Sess., 2 (1960). That the same 1965 act which included §203(a)(7) amended §244 to eliminate the ban on alien crewmen adjusting their status under the far more stringent residence and other requirements of that section while leaving intact the corresponding exclusion in §245, works against Tai Mui and Woo Cheng Hwa rather than for them. The Senate Committee, in recommending the change in §244, carefully said it felt "no distinction should be made in the treatment of aliens because of their manner of entry where they meet the other conditions which would qualify them for that form of discretionary relief." S. Rep. No. 748, 89th Cong. 1st Sess. (1965), in 1965 U. S. Code Cong. & Adm. News 3328, 3339. Moreover, the portion of the Senate Report dealing with §203(a)(7), after explaining that the proviso permits 5100 of the numbers authorized for refugees to "be used in lieu of conditional entries to adjust the status of refugees who have been physically present in the United States for 2 years," went on to say, "It is contemplated that such adjustments will be made under section 245 of the Immigration and Nationality Act." *Id.* at 3341. Although such a

gloss is less compelling than if it had been made in connection with a Senate amendment or were a statement in the reports of both houses or of a conference committee, it is entitled to weight nevertheless, see *Utah Junk Co.* v. *Porter,* 328 U. S. 39, 42-43 (1946)—surely as much as floor discussion in one house of an earlier Congress, see *Foti* v. *INS, supra,* 375 U. S. at 223-24. Reliance on such an expression is not "an attempted addition to the statute of something which is not there," *C. I. R.* v. *Acker,* 361 U. S. 87, 93-94 (1959); with §203(a)(7) susceptible of either of two constructions, the Senate Report confirms that the members of one house of Congress who were most knowledgeable on the subject and the others who read their report considered the bill to have the meaning we would have thought the more likely in any event. The construction urged by the Government leads to no absurd or unfair results; exclusion of alien crewmen from the preference accorded by §203(a)(7) simply improves the chance of others whom Congress could well have deemed to be more deserving.

V.

As indicated, Chan Hing's and Lai Cho's position is that the regulations dealing with conditional entries, 8 C. F. R. §235.9, are invalid for failure to list the United States as a non-Communist or non-Communist-dominated country where an alien may apply, be examined, and be granted a conditional entry with the consequent feasibility of his de-

parture to another country from which he can enter the United States. At the very least, the plaintiffs contend, the regulations are arbitrary in listing only countries in Europe and the Middle East[4] and excluding any in the Orient as places where applicants may be examined.

The first branch of the argument is quite unpersuasive. The natural reading of §203(a)(7) is that it accorded preference to two categories of refugees, those who were abroad and were seeking entry into the United States, and those who had already been here for two years. The "conditional entry" device was designed for the first group, the procedure of making a visa available in lieu of a conditional entry was intended for the second, and the obvious *casus omissus*—refugees here for less than two years—simply did not fall within the preferential scheme. If Congress had intended that refugees within this country not qualifying under the proviso for lack of two years residence should nevertheless be entitled to obtain in the United States the same treatment as those seeking entry from abroad, it would have found some way of saying this less awkward and susceptible to misinterpretation than including the United States under the rubric of "any non-Communist or non-Communist-dominated country." Furthermore, the House and Senate Committees said that the conditional entry procedure was "not unlike the parole

[4] Cuban and other western hemisphere refugees are not affected by this since they are "special immigrants" under §101(a)(27) who are not subject to the numerical limitation of §203 by express provision of §201(a). See Gordon and Rosenfield, Immigration Law and Procedure §§2.17, 2.20 (1966).

procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended that the procedure remain the same," the new term having been developed in order to avoid "a connotation unfavorable to the alien." H. R. Rep. No. 745 at 15, and S. Rep. No. 748 at 17, 89th Cong. 1st Sess. (1965), the latter reprinted in 1965 U. S. Code Cong. & Adm. News 3328, 3335. That statute had provided that the Attorney General "may parole into the United States, pursuant to such regulations as he may prescribe" an alien refugee-escapee who "(1) applies for parole while physically present within the limits of any country which is not Communist, Communist-dominated, or Communist-occupied . . . ," 74 Stat. 504 (1960). The regulations promulgated by the Attorney General pursuant to this grant of authority were nearly identical with those challenged by petitioners here, permitting application for parole to be made only to "the nearest office of the Service *in Europe,*" which applications were to be approved "by an officer in charge *outside the United States.*" 8 C. F. R. §212.5 (1965) (emphasis added).[5] If we would otherwise have had any doubts as to

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[5] "*Parole of aliens into the United States.* * * *

(b) *Refugee-escapees.* A separate application for parole as a refugee-escapee under section 1 of the Act of July 14, 1960, shall be executed and submitted by each applicant on Form I-590 to the officer in charge of the nearest office of the Service in Europe. . . . The approval of an application for parole under section 1 of the Act of July 14, 1960, by an officer in charge outside the United States authorizes the district director at a port of entry to parole the applicant upon arrival at such port within six months after the date of authorization. . . ." 8 C. F. R. §212.5 (1965).

the consistency of 8 C. F. R. §235.9 with congressional intent, this would resolve them.

Turning to the second branch of the argument, namely, that the regulation is invalid for failure to designate an office in the Far East, we encounter the difficulty that even if we thought the claim well-founded, we could hardly direct the Attorney General to supply the office the plaintiffs want. The only recourse open to the courts would thus appear to be to stay deportation of all Chinese refugees who seek conditional entries until such an office was established or, for those who were eligible, they met the two year test of the proviso—strong medicine, indeed. Before seriously considering any such confrontation with the executive branch, we would require far weightier evidence of arbitrary action than has been presented. A letter from the legal Adviser of the Department of State to the Assistant Attorney General in charge of the Criminal Division explains:

> "Under the Act of July 14, 1960, commonly referred to as the 'Fair Share' refugee law, the examination of refeugees who made application for parole was limited to seven countries, namely, Austria, Belgium, France, Germany, Greece, Italy and Lebanon, whose governments had consented, pursuant to an agreement reached with the Department of State, to the presence of United States immigration officers within their respective territories for the purpose of examining applicants for parole into this country as refugees, and also to the return to such country within a period of two years of

> any refugees found to be statutorily inadmissible into the United States. The Congress was aware of these arrangements when it enacted Section 203(a)(7) of Public Law 89-236, and, at the same time, repealed Sections 1, 2 and 11 of the Act of July 4, 1960. . . . Consequently, the former procedures have been continued in force to facilitate the conditional entry of refugees under Section 203(a)(7). The Secretary of State and the Attorney General have agreed, however, that if it should develop later that any changes in these procedures are desirable, they will be promptly effected upon agreement between the Department of State and the Department of Justice."

Figures for the fiscal year 1966 presented by the Special Assistant United States Attorney show that while of the 3191 aliens who were found qualified for conditional entry in the fiscal year ending June 30, 1966 only five were Chinese, the bulk of aliens adjusted to the status of permanent residents under the proviso were Chinese—3576 out of 4009—so that nearly half the aliens benefiting from the seventh category of preference have been Chinese. While it appears to be true that these were for the most part Chinese who had been admitted under the Hong Kong refugee program before enactment of the 1965 amendments, there is surely no indication that any discrimination against Chinese refugees has been practiced up to this time.

The orders of Judge Levet dismissing the complaints of Tai Mui and of Chan Hing and Lai Cho are affirmed; Woo Cheng Hwa's petition for review is denied.